

LATHAM & WATKINS LLP
1 Steven M. Bauer (Bar No. 135067)
2 steven.bauer@lw.com
3 Margaret A. Tough (Bar No. 218056)
4 margaret.tough@lw.com
5 505 Montgomery Street, Suite 2000
San Francisco, California 94111-6538
Telephone: +1.415.391.0600
Facsimile: +1.415.395.8095

LATHAM & WATKINS LLP
Melissa Arbus Sherry (*pro hac vice*)
melissa.sherry@lw.com
555 11th Street, NW, Suite 1000
Washington, DC 20004-1304
Telephone: +1.202.637.2200
Facsimile: +1.202.637.2201

10 CLARENCE, DYER & COHEN LLP
11 Kate Dyer (Bar No. 171891)
12 kdyer@clarencedyer.com
13 899 Ellis Street
14 San Francisco, California 94109-7807
15 Telephone: +1.415.749.1800
16 Facsimile: +1.415.749.1694

14 Attorneys for Defendant
PACIFIC GAS AND ELECTRIC COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

19 UNITED STATES OF AMERICA

20

21 PACIFIC GAS AND ELECTRIC
22 COMPANY,

22 Defendant.

CASE NO. CR-14-00175-TEH

**DEFENDANT'S MOTION TO DISMISS
COUNTS 4, 5 AND 24-28 AS BARRED
BY THE STATUTE OF LIMITATIONS**

Judge: Hon. Thelton Henderson
Date: August 17, 2015
Time: 10:00 A.M.
Place: Courtroom 2, 17th Floor

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on August 17, 2015, at 10:00 a.m., Defendant Pacific Gas and Electric Company (“PG&E”) will and hereby does move this Court for an order dismissing Counts 4, 5 and 24 through 28 of the superseding indictment as barred by the statute of limitations. The Motion will be based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Charles F. Taylor, the files and records of this case, and such other argument and evidence as the Court may consider.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 A fundamental principle of our justice system is that a person cannot be charged for a
4 crime allegedly committed outside the statute of limitations that Congress has set. As the
5 Supreme Court has explained, congressionally imposed time limits ensure that prosecutors act
6 promptly to protect defendants “from having to defend themselves against charges where the
7 basic facts may have become obscured by the passage of time and to minimize the danger of
8 official punishment because of acts in the far-distant past.” *Toussie v. United States*, 397 U.S.
9 112, 114-15 (1970), *superseded in part by statute in* 50 U.S.C. App. § 462(d). Most federal
10 crimes, including those charged here, must be brought within five years. 18 U.S.C. § 3282(a).
11 In this prosecution, the limitations period is actually almost seven years (six years and 349 days,
12 to be exact) because PG&E voluntarily agreed to give the government more time to investigate
13 its case. The government cannot prosecute the defendant for acts that occurred before 2007.

14 Yet, the superseding indictment seeks to do precisely that. It accuses the defendant of
15 committing knowing and willful criminal acts concerning recordkeeping 45 years ago
16 (“[s]tarting in or about August 1970”) or earlier still (“[s]tarting on a date unknown”). These
17 allegations reach back well outside the effective seven-year limitations period. While the
18 government may wish to present evidence of recordkeeping that occurred when rotary phones
19 and 8-track tapes were still the norm, basic principles of law and fairness bar it from doing so;
20 the alleged crimes are simply too far in the past and too remote to support a modern-day
21 prosecution. The recordkeeping counts should accordingly be dismissed.

22 The government presumably has some theory for why the law would allow these
23 evidently stale charges to proceed. Perhaps the government thinks it is entitled to an exception
24 to the statute of limitations because (it might argue) misplacing or discarding a pipeline record
25 decades ago is an ongoing act that persists—and may be prosecuted—for so long as the records
26 are missing. Such a theory, however, would vastly expand criminal liability and undermine the
27 whole point of the statute of limitations. (Moreover, it ignores the fact that the crime requires a
28 “knowing” and “willful” violation, which describes a discrete act.) The Supreme Court has

1 made it clear that courts may not craft exceptions to the statute of limitations: only Congress can
 2 create a “continuing offense” crime and it must do so clearly. Congress did not do that here.
 3 The limitations period began to run as soon as the alleged crime happened and the government
 4 could have brought a case.

5 On the face of the superseding indictment, the alleged recordkeeping offenses were
 6 complete, and the statute of limitations ran, many years before the return date. Weeks of trial
 7 and months of preparation about stale allegations therefore can (and should) be eliminated by
 8 applying basic statute of limitations law and dismissing the recordkeeping counts.

9 **II. BACKGROUND**

10 **A. The Statute of Limitations**

11 The governing statute of limitations provides that, “no person shall be prosecuted, tried,
 12 or punished for any offense, not capital, unless the indictment is found . . . within five years next
 13 after such offense shall have been committed.” 18 U.S.C. § 3282(a). At the government’s
 14 request, the defendant voluntarily extended this limitations period to approximately seven years.¹
 15 Accordingly, for charges in the original indictment, including Counts 4 and 5, the limitations
 16 period reaches back to April 17, 2007. For charges in the superseding indictment, including
 17 Counts 24 through 28, the limitations period reaches back to July 29, 2007.

18 **B. The Allegations of Counts 4, 5 and 24 through 28**

19 Each of these counts concerns regulations—enacted in 1970—about how operators
 20 should handle records concerning their underground pipelines. Counts 4 and 5 involve repair
 21 records. *See* Superseding Indictment (“SI”) ¶ 65; 49 C.F.R. § 192.709. Counts 24 through 28
 22 involve pressure test records. *See* SI ¶ 75; 49 C.F.R. § 192.517. There is quite a lot to be
 23 debated about these regulations such as: what they might mean, how operators have interpreted
 24 them and, ultimately, whether they can ever be the proper subject of a criminal prosecution. *See*
 25 Order Granting in Part and Denying in Part Defendant’s Discovery Motions (“Order”) 5-9 (Dkt.

26 _____
 27 ¹ The defendant signed an agreement suspending the statute of limitations as of April 17,
 28 2012, and repeatedly renewed that agreement until the government brought its original
 indictment. *See* Taylor Decl. Exs. 1-4.

103).² For this motion, what matters about the specific recordkeeping counts are the acts that the defendant is alleged to have knowingly and willfully performed and the time alleged for those acts. They are as follows:

Counts/Allegations	Action	Time of Action
Counts 4 and 5 (SI ¶ 65)	<i>“knowingly and willfully failed to maintain records concerning the date, location, and description of each repair made to [Lines 132 and 109]”</i>	“Starting on a date unknown to the grand jury and continuing until at least on or about September 9, 2010” Line 132: January 22, 2010 Line 109: January 22, 2010
Counts 24 through 28 (SI ¶ 75)	<i>“knowingly and willfully failed to retain . . . a strength test pressure record”</i>	“Starting in or about August 1970, and continuing through the date of this indictment”
General recordkeeping allegations (SI ¶¶ 22-24)	“did not have complete data . . . due to missing records and errors and omissions in existing records” “did not create a recordkeeping system . . . that would ensure that pipeline records were accessible, traceable, verifiable, accurate, and complete”	“Starting at a time unknown to the grand jury, and continuing until the San Bruno explosion”
General allegation (SI ¶ 33)	“had not maintained a record of . . . a pressure test”	“When the IM regulations went into effect [in 2004]”

That is the sum total of all references to the time at which the acts underlying the recordkeeping charges allegedly occurred.

The superseding indictment does not make any of the specific kinds of allegations typically seen in an indictment, such as “on or about January X, 2009, Engineer Y knowingly and willfully failed to retain pipeline records by destroying records of the January Z, 2009 pressure test on Line 1001, Segment 837.” The closest the indictment comes is when it pairs the

² The defense will address those distinct issues after the government complies with the Court’s Order on our discovery motions. Order (Dkt. 103). We respectfully reserve the right to bring other challenges to these counts.

1 allegation that the defendant “knowingly and willfully failed to maintain records concerning the
 2 date, location, and description of each repair made to” Lines 109 and 132, with a seemingly
 3 random date (January 22, 2010). SI ¶ 65. But January 22, 2010 does not correspond to the start
 4 date (“a date unknown”) or the end date (“September 9, 2010”) for Counts 4 and 5. The same
 5 date is repeated throughout the superseding indictment in relation to the integrity management
 6 counts and, as best we can tell, it may relate to the date of a 2010 “baseline assessment plan,”
 7 discussed further below.

8 **C. The Timing of Pipeline Maintenance Laws and Regulations**

9 Although the recordkeeping regulations charged were first adopted in 1970,³ violation of
 10 those regulations had no federal criminal consequences at that time. Congress did not enact the
 11 criminal statute at issue in this case until November 30, 1979. Pub. L. No. 96-129, 93 Stat. 989,
 12 992 (1979); 49 U.S.C. § 60123. Accordingly, any conduct before 1979 cannot be a federal
 13 crime.

14 Two other regulations describe exceptions to these regulations and are important in
 15 understanding transmission pipeline recordkeeping. First, the 1970 Grandfather Clause
 16 regulation provides generally that if pipeline pressure test records (such as those alleged in
 17 Counts 24 through 28) did not exist before 1970, operators could continue to operate their
 18 pipelines at or below their maximum historical pressure without any such records. *See* 35 Fed.
 19 Reg. at 13273. As PHMSA has explained, “the ‘grandfather clause[]’ allow[ed] pipelines that
 20 had safely operated prior to [1970] to continue to operate under similar conditions without
 21 retroactively applying recordkeeping requirements or requiring pressure tests.” 77 Fed. Reg.
 22 26822, 26823 (May 7, 2012).

23 Second, from the beginning, the integrity management regulations were intended to guide
 24 an evolving and improving process of managing buried gas pipelines. The regulations
 25 themselves state that operators should begin with a basic “framework” that, over time, “will
 26 evolve into a more detailed and comprehensive program, as information is gained and
 27 incorporated into the program.” 49 C.F.R. § 192.907(a); *see also* 68 Fed. Reg. 4278, 4312 (Jan.

28 ³ *See* 35 Fed. Reg. 13248, 13270; 13273 (Aug. 19, 1970).

1 28, 2003) (“Two essential elements of the integrity management program are that an operator
 2 continually assesses and evaluates the pipeline’s integrity, and performs an analysis that
 3 integrates all available information about the pipeline’s integrity. The process of planning,
 4 assessment and evaluation will provide operators with better data on which to judge a pipeline’s
 5 condition and the location of potential problems that must be addressed.”).

6 **III. DISCUSSION**

7 **A. The Recordkeeping Counts Should Be Dismissed Before Trial**

8 All of the recordkeeping counts should be dismissed for failing to allege a violation
 9 within the limitations period. The general rule is that the limitations period starts to run as soon
 10 as the alleged crime is committed. “[S]tatutes of limitations normally begin to run when the
 11 crime is complete.” *Toussie*, 397 U.S. at 115; *see also United States v. Smith*, 740 F.2d 734, 736
 12 (9th Cir. 1984) (same). “A crime is complete when each element of the crime has occurred”
 13 (*Smith*, 740 F.2d at 736), or, in other words, “the moment the crime is sufficiently complete to
 14 enable the government to initiate prosecution” (*United States v. Sloan*, 389 F. Supp. 526, 529
 15 (S.D.N.Y. 1975)). *See also United States v. Drebin*, 557 F.2d 1316, 1333 (9th Cir. 1977) (“The
 16 crime is complete as soon as every element in the crime occurs.”).

17 Statutes of limitations “represent[] a pervasive legislative judgment that it is unjust to fail
 18 to put the adversary on notice to defend within a specified period of time and that ‘the right to be
 19 free of stale claims in time comes to prevail over the right to prosecute them.’” *United States v.*
 20 *Marolf*, 173 F.3d 1213, 1217-18 (9th Cir. 1999) (quoting *United States v. Kubrick*, 444 U.S. 111,
 21 117 (1979)). Further, “[l]imitations statutes . . . are intended to foreclose the potential for
 22 inaccuracy and unfairness that stale evidence and dull memories may occasion in an unduly
 23 delayed trial.” *United States v. Gilchrist*, 215 F.3d 333, 338 (3d Cir. 2000) (omission in original)
 24 (quoting *United States v. Levine*, 658 F.2d 113, 127 (3d Cir. 1981)).

25 Now is the time to address the limitations failings in the indictment—before further
 26 pretrial preparation and before trial. A statute of limitations defense “bars prosecution.” *Smith*,
 27 740 F.2d at 739. And courts routinely dismiss indictments before trial when the crime charged is
 28 time-barred. *See, e.g., Bridges v. United States*, 346 U.S. 209, 227-28 (1953) (stating that “[t]he

1 motion to dismiss [the indictment] should have been granted when first made" before trial);
 2 *Smith*, 740 F.2d at 739 (affirming pre-trial dismissal on limitations grounds); *United States v.*
 3 *Nukida*, 8 F.3d 665, 669 (9th Cir. 1993) ("Rule 12(b) motions are appropriate to consider 'such
 4 matters as . . . statute of limitations[.]'" (citation omitted)).⁴

5 **1. Counts 4 and 5: Repair Records**

6 The superseding indictment charges the defendant with knowingly and willfully violating
 7 Section 192.709(a) of the Code of Federal Regulations by failing to maintain records for
 8 unspecified repairs on Lines 132 and 109. The indictment does not identify any particular
 9 repairs or records, or any specific act of failing to maintain such a record. Rather, it generally
 10 alleges that the violation occurred "[s]tarting on a date unknown to the grand jury." SI ¶ 65.
 11 Because Section 192.709 took effect in 1970, and because the federal criminal statute was
 12 enacted in 1979, these counts appear to allege acts that occurred many decades ago.

13 The government could have "initiate[d] prosecution" for knowingly and willfully failing
 14 to maintain a repair record as soon as the record was discarded or destroyed. There are no
 15 allegations in the indictment specifying when that act supposedly occurred. Indeed, the
 16 government has not alleged a single willful act within the limitations period. That is a critical
 17 flaw: the crime charged requires "knowing" and "willful" conduct. This describes a discrete act;
 18 an individual must knowingly and willfully discard or destroy a record previously created.
 19 Although an indictment need not include "exact dates," it must charge an offense "within the
 20 statute of limitations." *United States v. Austin*, 448 F.2d 399, 401 (9th Cir. 1971); *see also*
 21 *United States v. Gammill*, 421 F.2d 185, 186 (10th Cir. 1970) (indictment was insufficient
 22 because omission of the year the alleged conduct took place "prevents the indictment from
 23 charging an offense within the statute of limitations"). This the government has failed to do.

24

25

26 ⁴ See also *United States v. Lopez*, No. 10CR5155 BTM, 2012 U.S. Dist. LEXIS 5893, at
 27 *16 (S.D. Cal. Jan. 19, 2012) (granting motion to dismiss on statute of limitations ground), *aff'd*,
 28 576 F. App'x 680 (9th Cir. 2014); *United States v. Gross*, 159 F. Supp. 316, 322 (D. Nev. 1958)
 (same); *United States v. Pease*, No. CR-07-757-PHX-DGC, 2008 U.S. Dist. LEXIS 27331, at
 *7-8 (D. Ariz. Mar. 24, 2008) (granting, in part, motion to dismiss on statute of limitations
 ground); *United States v. W.R. Grace*, 429 F. Supp. 2d 1207, 1245 (D. Mont. 2006) (same).

1 There is one date within the limitations period identified in relation to Counts 4 and 5:
 2 January 22, 2010. *See SI ¶ 65.* But that date is untethered to the repair recordkeeping
 3 allegations. As noted above, it appears that January 22 is meant to reference the date on which
 4 the 2010 version of the defendant’s “baseline assessment plan” (a document used in planning
 5 integrity assessments on select transmission pipelines) was completed. And that same date is
 6 repeated throughout the superseding indictment with respect to the integrity management counts.
 7 Perhaps, then, the government is trying to tie the 1970 repair recordkeeping regulation to the
 8 2004 integrity management regulations and suggest, *sub silentio*, that the defendant knew as of
 9 January 22, 2010 that it had missing records. If so, that does not save the government’s case.

10 As an initial matter, the defendant created its first baseline assessment plan in 2004 and,
 11 consistent with the integrity management regulations, has updated that plan annually thereafter,
 12 *see* 49 C.F.R. § 192.905(c). Any gaps in the relevant repair records for these lines likely would
 13 have become known during the creation of the initial plan—three years outside the limitations
 14 period. There is nothing special about the 2010 update such that it would have revealed missing
 15 records that prior updates had not. More to the point, any claimed recordkeeping violation was
 16 complete, and the government could have brought its case, as soon as the records were discarded
 17 or destroyed (with the requisite knowing and willful intent). Unless that happened on January
 18 22, 2010 or on another date within the limitations period, and unless those facts are alleged in the
 19 indictment (which they are not), Counts 4 and 5 are time-barred.

20 **2. Counts 24 through 28: Pressure Test Records**

21 The superseding indictment also charges the defendant with knowingly and willfully
 22 violating Section 192.517(a) of the Code of Federal Regulations by failing to “retain for the
 23 useful life of the pipeline, a record for each [pressure] test performed under § 192.505 and
 24 192.507” containing certain specified information for five transmission lines. *See SI ¶ 75.*⁵

25 As with Counts 4 and 5, the indictment does not identify any particular pressure test or
 26 any particular person who destroyed a pressure test record. It alleges only that the offense
 27 occurred beginning in 1970—some 45 years ago. The indictment fails to allege any relevant

28 ⁵ Lines 132, 109, 153, 191-1 and DFM 1816-01. SI ¶ 75.

1 conduct within the limitations period. To the contrary, the only other date mentioned in relation
 2 to pressure test records (although, notably, not incorporated into Counts 24 through 28), is
 3 paragraph 33, which alleges that, “[w]hen the IM regulations went into effect” (*i.e.*, in 2004), the
 4 defendant had *already* failed to “maintain[]” pressure test records. SI ¶ 33. At best, all that
 5 would mean is that the act of failing to retain the records occurred before January 14, 2004
 6 (when the integrity management regulations became effective). It would also mean that the
 7 government may have charged the defendant with failing to retain records that did not need to be
 8 maintained under the Grandfather Clause.⁶

9 **3. The End Dates Do Not Save the Charges**

10 Alleging that the repair and pressure test recordkeeping violations continued until “at
 11 least on or about September 9, 2010” (SI ¶ 65) or “through the date of this indictment” (SI ¶ 75),
 12 respectively, cannot rescue the defective indictment. “The government . . . cannot simply charge
 13 an offense by using the general language of the statute or the common law, but must accompany
 14 the generic language with such a statement of the facts and circumstances as will inform the
 15 accused of the specific offense, coming under the general description, with which he is charged.”
 16 *United States v. Hitt*, 249 F.3d 1010, 1025 (D.C. Cir. 2001) (citation and quotation marks
 17 omitted). As set forth above, the superseding indictment contains no specific allegations of
 18 relevant acts within the limitations period—*i.e.*, between April 17, 2007 and September 9, 2010
 19 for Counts 4 and 5; between July 29, 2007 and July 29, 2014 for Counts 24 through 28.

20 The D.C. Circuit’s decision in *United States v. Hitt* is instructive. There, the indictment
 21 alleged that the charged conspiracy persisted until March 1995—a date within the limitations
 22 period. 249 F.3d at 1024. But the indictment contained no “specific allegations” of conduct
 23 taken in furtherance of that conspiracy after September 1994, one month outside the limitations
 24 period. *Id.* at 1017. The D.C. Circuit explained that “the Fifth Amendment requires that
 25 criminal prosecutions be limited to the unique allegations of the indictments returned by the
 26 grand jury.” *Id.* at 1016 (citing *Russell v. United States*, 369 U.S. 749, 768-71 (1962)). Because

27 ⁶ The Court noted this point. *See* Order 20 (Dkt. 103) (“[T]he Indictment does not include
 28 allegations that specific pressure test records were required, and the age of the relevant pipeline
 suggests it could have been grandfathered in such that no records were required.”).

1 the specific allegations did not show that the conspiracy persisted into the limitations period, the
 2 indictment had to be dismissed. *Id.* at 1024-26. The same is true here.

3 **B. The Continuing Offense Theory Does Not Apply**

4 These statute of limitations violations are so plain that the prosecution must be relying on
 5 some theory that (it believes) warrants an exception to the general rule. No such theory is stated
 6 on the face of the superseding indictment but, in the interests of prompting a complete legal
 7 discussion, we will venture a guess.

8 It may be that the government is seeking to invoke the so-called “continuing offense”
 9 doctrine by using phrases like “starting on . . . and continuing.” SI ¶¶ 65, 75. Perhaps the
 10 government thinks that the failure to maintain or retain records is a crime that continues for so
 11 long as the records are missing and, in that sense, are “continuing offenses.” If so, the
 12 government misunderstands this very limited exception to the general rule that the limitations
 13 period begins to run as soon as the prosecution can bring its case.

14 The Supreme Court is clear that the continuing offense doctrine “should be applied in
 15 only limited circumstances.” *Toussie*, 397 U.S. at 115. And there is a simple reason this case is
 16 not one of those “limited circumstances”—only Congress can define a continuing offense crime.
 17 An offense cannot be continuing unless: (1) “the explicit language of the substantive criminal
 18 statute compels such a conclusion”; or (2) “the nature of the crime involved is such that Congress
 19 must assuredly have intended that it be treated as a continuing one.” *Id.*; *see United States v.*
 20 *Nash*, 115 F.3d 1431, 1441 (9th Cir. 1997) (“[T]here is a presumption against finding continuing
 21 violations unless the language of the statute compels such a conclusion or the nature of the crime
 22 involved is such that Congress ‘must assuredly have intended that it be treated as a continuing
 23 one.’” (citation omitted)). The criminal statute here quickly fails under both prongs.

24 The language of the statute says only that a person “knowingly and willfully violating . . .
 25 a regulation prescribed . . . under this chapter shall be fined under title 18, imprisoned for not
 26 more than 5 years, or both.” 49 U.S.C. § 60123(a). Nothing there suggests a continuing offense,
 27 let alone “compels” such a conclusion. When Congress passes a continuing offense crime, it
 28 says so. For example, the bankruptcy concealment statute states: “The concealment of assets of

1 a debtor in a case under title 11 shall be deemed to be a continuing offense” 18 U.S.C.
 2 § 3284. The Foreign Agents Registration Act says: “Failure to file any such registration
 3 statement or supplements thereto . . . shall be considered a continuing offense for as long as such
 4 failure exists, notwithstanding any statute of limitation or other statute to the contrary.” 22
 5 U.S.C. § 618(e). And, after the Supreme Court’s decision in *Toussie* (discussed above and
 6 below), Congress amended the military draft registration statute to clarify that it is now
 7 continuing. *See* 50 U.S.C. App. § 462(d).

8 Here, there is no need to make a guess about Congress’s intent: one need look no further
 9 than the Pipeline Safety Act itself. Congress did allow for a continuing violation—but only in
 10 *civil cases*. In its civil penalty provision, the Act states that “a separate violation occurs for each
 11 day the violation continues.” 49 U.S.C. § 60122(a)(1). By contrast, the criminal provision
 12 contains no analogous language. 49 U.S.C. § 60123(a). “[W]hen ‘Congress includes particular
 13 language in one section of a statute but omits it in another,’” courts generally presume “that
 14 Congress intended a difference in meaning.” *Loughrin v. United States*, 134 S. Ct. 2384, 2390
 15 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). “If Congress had intended
 16 [the criminal offense to be a continuing one], it could have clearly stated so.” *United States v.*
 17 *Dunne*, 324 F.3d 1158, 1164 (10th Cir. 2003); *see also United States v. Tavarez-Levario*, 788
 18 F.3d 433, 437-38 (5th Cir. 2015). Congress knew how to create a continuing offense crime and
 19 chose not to.

20 Nor does anything about the “nature” of the statutory offense mean that Congress
 21 “assuredly” must have intended it to be continuing—even though it didn’t say so explicitly.
 22 *Toussie*, 397 U.S. at 115. The statute at issue only criminalizes, at a very general level, a
 23 knowing and willful violation of dozens of regulations “prescribed . . . under [the Pipeline Safety
 24 Act.]” 49 U.S.C. § 60123(a). There is nothing “inherent in the act” of violating unspecified
 25 regulations promulgated (or to be promulgated) under the Pipeline Safety Act indicating that
 26 Congress intended for it to be a continuing offense.

27 That marks the end of the analysis. But, since we are already predicting what the
 28 government might say in response, one could imagine the government invoking the specific

1 regulations charged and arguing that the regulations themselves somehow create a continuing
 2 offense. Any such argument would run head first into the Supreme Court's seminal decision in
 3 *Toussie*. There, the Court considered whether a defendant's failure to register for the draft
 4 constituted a continuing offense. The statute made it the duty of men between the ages of
 5 eighteen and twenty-six to "submit to registration at such time or times and place or places, and
 6 in such manner, as shall be determined by . . . rules and regulations prescribed hereunder." 397
 7 U.S. at 113 (quoting 50 U.S.C. App. § 453). The implementing regulations required all men to
 8 register within five days of their eighteenth birthday, *id.*, but also specified that "[t]he duty of
 9 every person subject to registration . . . shall continue at all times," and that "if for any reason
 10 any such person is not registered [within five days], he shall immediately present himself for and
 11 submit to registration," *id.* at 116.

12 The government argued that this regulation demonstrated that the duty to register was a
 13 continuing one and the failure to register a continuing offense. *Id.* at 115-16. The Supreme
 14 Court disagreed. Although "the statute admittedly might be construed as the Government
 15 urges," the Court concluded that the statute itself did not compel the government's interpretation.
 16 *Id.* at 116. And "[w]hile . . . the regulation d[id] in explicit terms refer to registration as a
 17 continuing duty," the Court refused to permit the regulation to itself create a continuing offense
 18 for limitations purposes. *Id.* at 120-21. "Since such offenses are not to be implied except in
 19 limited circumstances, and since questions of limitations are fundamentally matters of legislative
 20 not administrative decision," the Court explained, the regulation could not "stretch a five-year
 21 statute of limitations into a 13-year one, unless the statute itself, apart from the regulation,
 22 justifie[d] that conclusion." *Id.* at 121; *see also United States v. Eklund*, 733 F.2d 1287, 1299
 23 (8th Cir. 1984) ("[W]hether an offense is a continuing one is for Congress to determine, and not
 24 contingent on administrative regulations.").

25 In any event, there is nothing explicit in the language of the recordkeeping regulations—
 26 or inherent in the nature of those regulations—to support a continuing offense theory. PHMSA's
 27 civil and criminal enforcement regulations mirror the statutory dichotomy between the civil
 28 violation (which is continuing) and the criminal offense (which is not). *Compare* 49 C.F.R.

1 § 190.223(a) (civil violations “continue[]” until the violation has been remedied), *with* 49 C.F.R.
 2 § 190.291(a). And the knowing and willful failure to “maintain” or “retain” a record (of a repair
 3 or a pressure test) does not “contemplate[] a prolonged course of conduct.” *Dunne*, 342 F.3d at
 4 1165. Indeed, *United States v. Sloan*, 389 F. Supp. 526 (S.D.N.Y. 1975), teaches that even when
 5 Congress (not an agency) has criminalized the failure to maintain certain records—and thus the
 6 two-prong test from *Toussie* applies—that is insufficient to establish a continuing crime.⁷

7 **C. Any Exception to the Statute of Limitations Fails Under the Rule of Lenity**

8 Finally, in trying to determine what the prosecution’s theory might be and what it might
 9 say in response to our motion, we want to remind the Court about the rule of lenity. As the
 10 Supreme Court has explained, “when [a] choice has to be made between two readings of what
 11 conduct Congress has made a crime, it is appropriate, before . . . choos[ing] the harsher
 12 alternative, to require that Congress should have spoken in language that is clear and definite.”
 13 *Toussie*, 397 U.S. at 122 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218,
 14 221-22 (1952)); *see also United States v. Millis*, 621 F.3d 914, 916-17 (9th Cir. 2010) (“[T]he
 15 rule of lenity requires courts to limit the reach of criminal statutes to the clear import of their text
 16 and construe any ambiguity against the government.”) (citation and quotation marks omitted);
 17 *Tavarez-Levario*, 788 F.3d at 441 n.6 (same).

18 This rule applies equally to ambiguity regarding the precise contours of a criminal
 19 limitations period. Thus, in *Toussie* itself, “faced with the task of construing a somewhat
 20 ambiguous statute in one of two ways”—to either “limit institution of prosecution to a period of

21 ⁷ In *Sloan*, the government argued that the statute of limitations had not run on the crime of
 22 making or maintaining false records. The defendants were charged with “*maintaining* the
 23 inaccurate records” and the government asserted that the “crime would not be complete until that
 24 required preservation period elapsed.” 389 F. Supp. at 528 (emphasis in original). Looking to
 25 *Toussie*, the court rejected the government’s argument because nothing in the statute extended
 26 the time beyond the moment the crime was “sufficiently complete to enable the government to
 27 initiate prosecution.” *Id.* at 529. The court explained that “there can be no question that the
 28 government could have commenced prosecution the day after the false entries were made.” *Id.*
 Similarly, “if defendants had made true entries and thereafter destroyed them, . . . the
 government . . . could have initiated prosecution the moment the records were destroyed.” *Id.*
 Either way, the statute of limitations began to run the day the wrongful conduct took place and
 expired five years later. *Id.*

1 five years following the initial violation, [or] effectively extend the final date for prosecution
2 until as late as 13 years after the crime is first complete”—the Court chose the more lenient
3 construction. 397 U.S. at 122. Here too, if there were any ambiguity as to whether the alleged
4 regulatory violations are continuing offenses or not, or whether some other exception might
5 apply, the rule of lenity requires the Court to answer in the negative and to dismiss the stale
6 charges.

7 | IV. CONCLUSION

8 For the foregoing reasons, the defendant respectfully asks the Court to dismiss Counts 4,
9 5 and 24 through 28 of the superseding indictment.

10 | Dated: July 27, 2015

Respectfully submitted,

By _____ /s/
Steven M. Bauer
Margaret A. Tough
Melissa Arbus Sherry
LATHAM & WATKINS LLP

Kate Dyer
CLARENCE, DYER & COHEN LLP

*Attorneys for Defendant
Pacific Gas and Electric Company*